

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOYCE K. FRYE)	
Claimant)	
)	
VS.)	
)	
WAL-MART, INC.)	
Respondent)	Docket No. 1,047,799
)	
AND)	
)	
INS. CO. OF STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the April 14, 2010 Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca A. Sanders.

ISSUES

Claimant alleges she was injured at work on August 4, 2009, while moving a case of water at her cashier's station. In the April 14, 2010 Order, the Administrative Law Judge (ALJ) authorized Dr. Florin Nicolae to provide claimant with medical treatment, including injections into the cervical spine. The ALJ stated the injections were "to treat radiculopathy and radiating pain from [claimant's] shoulder injury."¹

Respondent contends the ALJ erred as claimant failed to prove she sustained a cervical injury in her accident at work and failed to prove she needed any additional medical treatment. Accordingly, respondent requests the Board to reverse the April 14, 2010 Order.

Claimant argues this appeal should be dismissed as respondent has failed to state an issue that is subject to an appeal from a preliminary hearing order. In the alternative, claimant maintains the requested medical treatment from Dr. Nicolae was recommended by the authorized physician as part of claimant's authorized medical care. Moreover,

¹ ALJ P.H. Order (Apr. 14, 2010) at 1.

claimant asserts that Dr. Nicolae recommended trigger point injections into claimant's left shoulder, left cervical region, and left upper extremity to treat the radiculopathy and radiating pain from her injured shoulder. Accordingly, claimant contends the April 14, 2010 Order should be affirmed.

The issues before the Board on this appeal are:

1. Is Dr. Nicolae's medical report of February 22, 2010, part of the record?
2. Does the Board have the jurisdiction in an appeal from a preliminary hearing order to determine whether claimant injured her neck in her accident at work?
3. If so, are the injections proposed by Dr. Nicolae related to claimant's accident at work?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

Claimant works for respondent as a cashier. On August 4, 2009, claimant felt a pop in her left shoulder while moving a case of water from the scanner at her cashier's station. The claimant immediately experienced pain in her shoulder and down into her left arm.

The accident tore claimant's left rotator cuff. And on November 6, 2009, Dr. Bradley Poole operated on claimant's shoulder, debriding the rotator cuff and performing a subacromial decompression.

Despite the shoulder surgery, claimant's symptoms did not resolve. Dr. Poole referred claimant for another MRI due to her neck and shoulder pain. That MRI was performed in February 2010 and its results were compared to the results from a November 2003 MRI. The more recent MRI revealed relatively minor degenerative changes with no significant central canal stenosis, as such, the results were quite similar to the earlier study.

Dr. Poole also referred claimant to Dr. Nicolae, who suggested both trigger point injections and "the possibility of a cervical epidural steroid injection under fluoroscopy . . . to treat left cervical radicular symptoms. . ."² Dr. Nicolae, who practices pain management, saw claimant on February 22, 2010, and indicated that claimant had been referred due to her left shoulder pain. Moreover, the doctor noted that claimant had been experiencing

² P.H. Trans, Cl. Ex. 1.

pain in the left side of her neck, left upper and mid back, left upper extremity, and occipital headaches since her accident at work. Dr. Nicolae's diagnoses included left shoulder, left neck and left upper extremity pain from myofascial pain syndrome and cervical disk displacement. The doctor wrote Dr. Poole, including a rather detailed history and diagnoses:

As you know is a 55-year-old woman presenting for pain in the left shoulder but also on the left side of her neck, left upper and mid back, left upper extremity as well as left occipital headaches. All these symptoms started at the time of a work injury on August 4, 2009 when she performed a movement of sliding and lifting of a case of bottled water at work. On November 6, 2009 you performed a left shoulder arthroscopy with debridement of the left rotator cuff and subacromial decompression. She says that she did not improve much following her surgery. She has tried physical therapy with only short term relief. She has tried Lortab with mild relief. She has used ibuprofen initially without relief. She has had no recent pain management procedures. Her pain is continuous perceived as a dull ache or sharp and severe. It increases with movement of the left upper extremity but also with movements of the cervical spine as well as with a prolonged sitting position. It decreases with heat applications. She has paresthesias in the fingers 3 and 4 on the left and she has some mild left upper extremity weakness.

ASSESSMENT:

1. Chronic and severe left shoulder pain, left neck and left upper extremity pain with left occipital headaches and paresthesias in the left upper extremity – following work injury on August 4, 2009 – the following mechanisms likely contribute to it.
 - a. Myofascial pain syndrome with severe myalgia of the above mentioned muscles.
 - b. C6-C7, C5-C6, and C4-C5 disc displacements with left cervical radiculitis – I believe this also applies as a mechanism of her pain because of her pain being referred all the way into her left upper extremity because it increases with certain movements of the cervical spine because of the tenderness at the level of the cervical interspinous spaces and because of the tenderness at the level of the cervical interspinous spaces and because of the paresthesias in the left upper extremity.

Respondent challenged whether Dr. Nicolae's report was in the record as respondent's copy of the preliminary hearing transcript did not contain the doctor's medical report. The transcript filed with the Division of Workers Compensation had page three of the doctor's three-page report. The undersigned Board Member finds the entire report is included in the preliminary hearing record as the ALJ specifically referenced the report and

admitted it into the preliminary hearing record.³ Dr. Nicolae's medical report is part of the record for purposes of this appeal.

At her attorney's request, in late March 2010 claimant was examined by orthopedic surgeon Dr. Edward J. Prostic. In his March 29, 2010, report, Dr. Prostic noted that claimant experienced pain in her neck and shoulder following her incident at work. Moreover, the doctor determined that claimant injured her neck and shoulder in that incident and that she had a permanent impairment. The doctor concluded:

On or about August 4, 2009, Joyce K. Frye sustained injury to her neck and left shoulder during the course of her employment. She has had poor response to left shoulder surgery. She needs to continue with stretching and strengthening exercises and anti-inflammatory medicines as needed. She should continue under the restrictions imposed by Dr. Bradley Poole. Permanent partial impairment is rated at 5% of the body as a whole for the cervical spine and 15% of the left upper extremity, for combined impairment of 14% of the body as a whole on a functional basis.⁴

Moreover, in an April 2, 2010, letter to claimant's attorney, Dr. Prostic added:

The work-related accident of August 4, 2009 has caused a permanent aggravation of underlying degenerative changes in her cervical spine. Treatment to the cervical spine is unlikely to be rewarding. Symptoms will not deferuesce until the shoulder is better and will at that point likely be unnecessary.⁵

One of the reasons respondent has objected to the proposed injections into claimant's cervical spine is the March 11, 2010 letter from Dr. Poole. In that letter the doctor indicated the degenerative changes in claimant's neck were not caused by her accident at work. The doctor noted:

Ms. Frye had persistent difficulty with newer complaints involving paresthesias extending down to her hand. These complaints would be directly referable to the cervical spine pathology. With Dr. Nicolae's findings, the patient was noted to have some changes involving some disc bulging at levels C4-5, C5-6, and C6-7. In this patient's age range, these findings are often evident on an MRI with no significant inciting event. These changes can be related to the age appropriate degeneration, as well as changes of the discs over time. At this point, it is unlikely that her

³ P.H. Trans. at 4-5.

⁴ *Ibid.*, Resp. Ex. A at 3.

⁵ *Ibid.* at 4.

situation in terms of moving the water bottles would have caused these changes to her cervical spine.⁶

The ALJ considered the above evidence and determined that the proposed injections to claimant's cervical spine were related to the accident at work. The undersigned Board Member agrees. Although claimant experienced some difficulty at the preliminary hearing explaining where she felt pain following her accident, the histories that claimant provided to Dr. Nicolae in February 2010 and to Dr. Prostic in March 2010 were similar in that she had pain both in her left shoulder and neck following her accident at work. Claimant's difficulty appears to have been partly due to how the questions were worded. The parties will have additional opportunity to explore this particular matter as the claim proceeds.

In summary, the undersigned Board Member finds the treatment recommended by Dr. Nicolae relates to the injury claimant sustained at work and, therefore, the Preliminary Hearing Order should be affirmed.

Claimant challenged whether the Board had jurisdiction to review the Preliminary Hearing Order. The Workers Compensation Act specifically grants the Board the authority to review preliminary hearing findings of, among others, whether a worker sustained an accidental injury and whether that injury arose out of and in the course of the worker's employment.⁷ The issue before the Board on this appeal is whether the proposed injections are related to claimant's accident at work. And that issue is tantamount to whether the targeted injury arose out of and in the course of claimant's employment. Accordingly, the undersigned Board Member finds the Board has jurisdiction over this appeal.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated April 14, 2010, is affirmed.

⁶ *Ibid.*, Resp. Ex. B.

⁷ See K.S.A. 44-534a(2).

⁸ K.S.A. 44-534a.

⁹ K.S.A. 2009 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this 30th day of July, 2010.

DAVID A. SHUFELT
BOARD MEMBER

c: George A. Pearson, Attorney for Claimant
Matthew R. Bergmann, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge